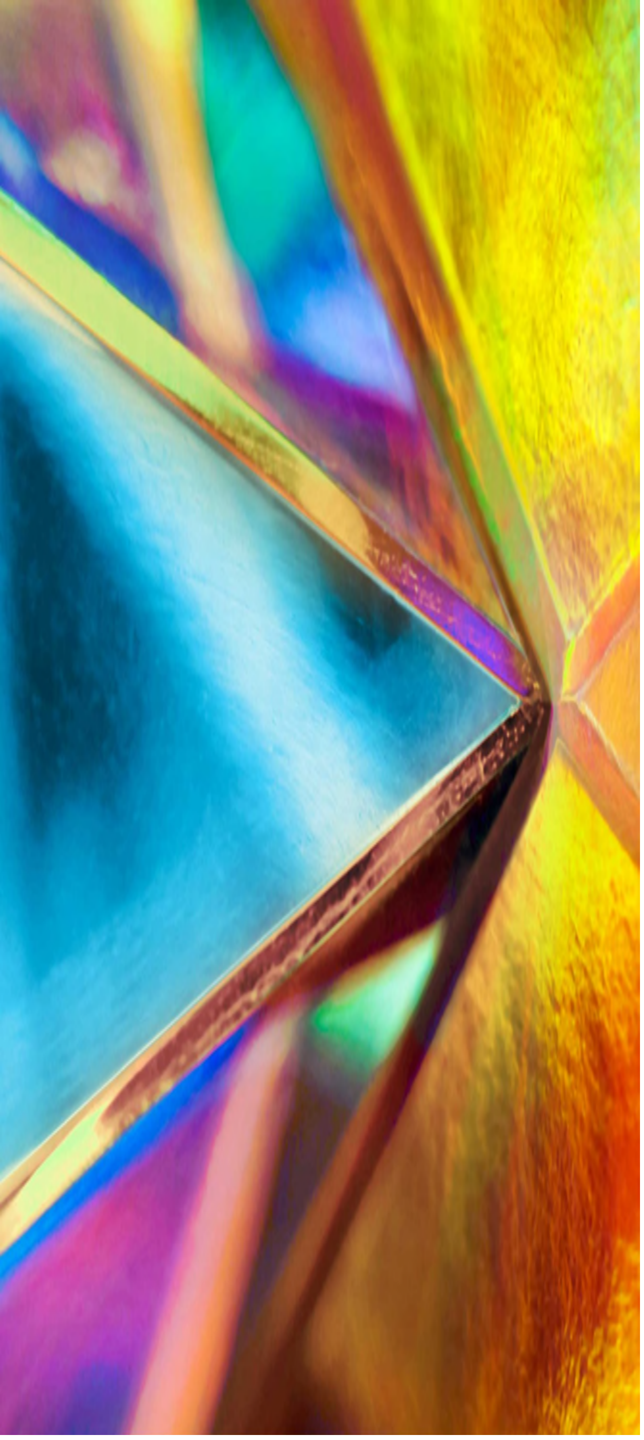

WHITE & CASE

Public to Private Deals in US

Six key things you need to consider

US federal law and state corporate law form the legal framework for taking a US listed company private.

- Structure and Timeline
- Financing
- SEC Disclosure
- Stockholder Litigation, Appraisal and Activism
- Deal Protections
- CFIUS Review

Structure and Timeline

In the US, a "take private" transaction can be structured as a one-step merger or a tender offer followed by a short-form merger.

One Step Merger

A one-step merger is currently the most popular way to take a public company private (used in 83% of transactions in 2021). Under a one-step merger, the buyer and oftentimes a newly formed subsidiary ("Merger Sub") enter into a merger agreement with the target company, pursuant to which the target company merges with the Merger Sub and becomes a wholly owned subsidiary of the buyer. The merger must receive target shareholder approval, usually a simple majority of all outstanding shares (but the actual voting standard will depend on the state law requirement and the organizational documents of the target). While timelines of transactions vary based on many factors, assuming no regulatory complexity, a one-step merger can be completed within 2-3 months after announcement.

Tender Offer (Two Step Merger)

In a friendly tender offer, the buyer enters into a merger agreement with the target company that specifies the process to launch and close the tender offer (Step 1), which is conditional on a majority of the outstanding shares being tendered, and then to consummate the back-end merger (Step 2), which will deliver 100% ownership of the target company.

The tender offer must be open to target shareholders for a minimum of 20 business days and must comply with filing and other SEC requirements. For a Delaware target company, acceptance of the tender offer by a simple majority of the outstanding shares will permit the buyer to immediately "squeeze out" the remaining shareholders in a short form merger without having to obtain any shareholder vote. In jurisdictions where a short-form merger requires a higher threshold (e.g., 90%), parties usually achieve the "squeeze out" by requiring the target company to issue "top-up" options. Otherwise, a shareholder vote, as described in the one-step merger, is required.

Tender offers in theory can be closed more quickly than a one-step merger, e.g., 40 days after announcement. However, the target board continues to be subject to fiduciary obligations to consider a higher offer for as long as the tender offer is not closed, making a tender offer generally undesirable for a transaction involving a long period between signing and closing due to regulatory or other reasons.

Structure and timeline

Closing certainty

A public company board will be very focused on the certainty of closing a sale transaction. As a result, the closing conditions of a US public company acquisition are fairly standardized and generally do not involve the receipt of non-regulatory third-party consents.

The target board will be focused on the financial capabilities of buyer and its source of funds. If the buyer is a private equity fund or otherwise depends on debt financing, the board generally can get comfortable with a market reverse breakup fee (generally 5-6% of transaction value) if the debt funding is unavailable.

A buyer should expect that once it signs a public company merger agreement, it will be difficult to back out of the deal.

Financing

Unlike certain jurisdictions in the UK and Europe which have legal requirements regarding the sources of funding and conditions to its availability, the US does not have such legal requirements. Instead, access to funding and conditionality is driven by commercial expectation and market practice.

Practically, a buyer must still demonstrate at signing that it has or will have sufficient funds. This is usually not an issue for a strategic buyer with a large balance sheet. A private equity buyer paying a partial equity check will need to deliver binding debt commitment letters covering the balance of the purchase price, with the long form definitive loan agreement negotiated between signing and closing.

The target company will require that the commitment letters have coterminous closing conditions with the M&A agreement to minimize any "daylight" between the M&A agreement and the debt commitment letters. That would ensure that the debt will be funded when the M&A deal closes.

For loans that require syndication, the M&A agreement sometimes contemplates a "marketing period" concept, the expiration of which is essentially a closing condition. In such instance, the "required financial information" to be delivered by the target company to start the "marketing period" should be carefully negotiated.

In some instances, the buyer will tap into the bond market to obtain debt financing, which involves additional capital markets and timing considerations that will be worked out by the parties. A bridge loan is sometimes utilized to provide a backstop.

SEC Disclosure

In order to obtain its shareholder vote, the target company is typically required to file a proxy statement with the SEC containing material information on the transaction, including the deal terms, the background of the target company's sale process and the parties' negotiation, the financial advice that the target company received and the projections that the target company's board relied on or provided to the buyer.

The extensive public disclosure often comes as a surprise to first time buyers. Buyers should be aware that material discussions with the target company, including with respect to compensation arrangement with the target's executive officers, may need to be disclosed.

For a private equity buyer, to avoid triggering the heightened disclosure regime under so-called Rule 13e-3 and to avoid disclosure of its proposed post-closing compensation arrangements, it is often advisable that discussions on compensation arrangements be deferred until after the target shareholder meeting.

Stockholder Litigation, Appraisal and Activism

The buyer should generally assume that a US public company target will be subject to plaintiff law firms' demand letters or lawsuits for any combination of:

(a) alleged deficiencies in the SEC disclosures;

(b) failure of the target board to discharge its fiduciary duties, and

(c) appraisal actions challenging the fair value of the deal consideration, in each case in connection with the acquisition.

Most of these demands or lawsuits will be settled without a full blown court process. However, it is important that buyer be cognizant of this risk and budget for additional transaction expenses as a result thereof. The buyer, as the parent company of the target, will inherit all liabilities and expenses incurred by the target company defending against these demands/lawsuits.

More recently, activist hedge funds are also targeting either side to an M&A deal to seek arbitrage opportunities. For example, a target company may attract an activist which will agitate the shareholder base to vote against the transaction unless the price is bumped up in what is known as "bumpitrage,"

Deal Protections

The board of directors of a Delaware corporation is subject to fiduciary duties to act on an informed basis and in the best interests of the company's stockholders. In the context of a sale of the company, this duty usually requires the board of directors to seek the highest price reasonably available before the shareholders have voted for the transaction at the shareholder meeting (in a one-step merger) or the closing of the tender offer (in a two-step merger).

As a result, most public company M&A agreements contain so-called "fiduciary out" provisions, permitting the target company board to accept a superior proposal before the shareholder meeting or the closing of the tender offer as long as it pays a termination fee to the incumbent buyer (usually around 3%).

Therefore, a buyer will seek to shorten the period of time between the deal's announcement and the shareholder meeting to reduce the interloper risk.

CFIUS Review

The Committee on Foreign Investment in the United States ("CFIUS") may review:

(1) transactions that could result in foreign control of a US business;

(2) certain real estate transactions in sensitive locations, and

(3) certain non-passive investments in US businesses involved with critical infrastructure, critical technologies, or sensitive personal data.

The CFIUS process is largely voluntary, although there are two categories of mandatory filing requirements:

- investments by foreign investors (subject to certain exemptions) in certain US businesses involved with critical technologies; or
- certain investments by foreign investors with substantial foreign government ownership (subject to certain exemptions) in certain US businesses involved with critical technologies, critical infrastructure, or sensitive personal data.

The CFIUS review timeline can vary and parties should seek legal counsel to determine the advisability of a filing and the type of filing process to follow.

A well-advised target company often seeks a reverse termination fee triggered by failure to receive the CFIUS approval as a matter of risk allocation between the parties.

WHITE & CASE